No. 13494

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALASKA AIRLINES, INC., a Corporation,
Appellant,

vs.

ARTHUR W. STEPHENSON,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA—THIRD DIVISION

REPLY BRIEF FOR APPELLANT

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I.

There was no substantial evidence to support the jury's finding of a contract and this Court is free so to hold upon the present record.

Appellant in its main brief maintained that the essential elements of a contract were not proved; that proof of the duration of the employment, date when the period of employment was to commence, amount of salary, and consideration for the employer's alleged promise were all lacking. And furthermore, upon plaintiff's own testimony, facts were proved which made it highly improbable that defendant would have entered into the alleged contract prior to the granting by the Civil Aeronautics Board of a Certificate of Public Convenience and Necessity. Appellee's brief has wholly failed to meet this argument. Instead, appellee has taken refuge behind two legal propositions: (1) "that an appellate court will not interfere with

the trial court's fact-findings on conflicting evidence''; and (2) that an appellate court will not consider the question of the sufficiency of the evidence unless all of the evidence is included in the record on appeal.

As to the first proposition, appellant is not asking the Court to resolve conflicting evidence. Actually the conflicts between Stephenson and Marshall were minor. But because the jury must be presumed to have preferred Stephenson's version to Marshall's, appellant's main brief based no argument at all upon Marshall's testimony. Appellee, upon his own case, simply failed to prove a contract.

As to the second proposition, appellant complied fully with Rule of Civil Procedure 75 and that was all that it was required to do.

The state cases cited by appellee (Brief, pp. 11-15) were all decided under different systems of appellate procedure. *Eddie* v. *Schumacher* (2d Dist. 1926) 79 Cal. App. 318, 249 P. 235, dealt with a ''bill of exceptions''; *Bracken* v. *Bracken* (1927) 52 So. Dak. 252, 217 N. W. 192, with an ''abstract of the evidence.'' In *Whalen* v. *Ruiz* (3d Dist. 1952) 110 A. C. A. 168, 242 P. 2d 78, the appeal was taken upon the bare judgment roll. Appellee, which had been dismissed below upon a ground held erroneous by the appellate court, had been given leave to bring up the evidence, which it contended would have sustained the judgment in its favor upon another ground, and had brought up only a part. This case obviously has no application.

The federal case, *Nolan* v. *United States* (8 C. A. 1935) 75 F. 2d 65, was decided several years before the Federal Rules of Civil Procedure went into effect.

The spirit of Rule 75 is embodied in subdivision (e): ''All matter not essential to the decision of the questions presented by the appeal shall be omitted.'' The older systems placed the entire responsibility of getting up the record upon the appellant. The appellant still has that

responsibility under Rule 75. Appellant must procure for and include in the record testimony and exhibits that his adversary has designated as well as that which appellant himself has designated. But if appellant specifies his points, he is not obliged to include in the record matter not designated by him which appellee has also not designated. By this method of specification of points and of designation of matters to go in the record by both parties, the object of excluding the nonessential is attained, while making sure that nothing is excluded which bears upon the points specified.

Here, in compliance with the rule, appellant designated its points (337) and designated the contents of the record (338). One of the points designated was:

> "That the evidence is insufficient to establish a contract between the parties, written or oral."

If there were anything in the matter omitted which would have tended to sustain the verdict, appellee had full opportunity to designate it and failed to do so. Even now he does not point out any evidence whatsoever, material or otherwise, in the omitted matter which would sustain his position.

The case is fully covered by the decision of this Court in *Associated Indemnity Corporation* v. *Manning* (9 C. A. 1939) 107 F. 2d 362, where the Court said, per HEALY, J. (p. 363):

> "Appellant contends that these findings are not supported by the evidence. Appellees, while defending the findings, insist that the evidence is not all here, hence the findings are not subject to attack. With respect to the latter proposition, it need only be said that appellant complied with Rule 75 of the Rules of Civil Procedure for the District Courts, 28 U. S. C. A. following section 723c, in effect at the time the appeal was taken. Appellees have not called attention to any material evidence claimed to have been omitted from the record."

In addition to the question of contract or no contract, the case presented what amounted to an audit of appellee's expense account. The matter omitted consisted of testimony of appellant's comptroller, C. W. Baruth, part of the cross-examination of appellee, and certain exhibits, all dealing with this expense account except Exhibit 3, letter of Western Airlines, dated September 22, 1950, granting appellee 180 days' leave, and Exhibit 4, agreement between Western Airlines and its pilots, effective November 16, 1949, testified to by appellee at record, page 134, matters not in dispute. To avoid all question, appellant has obtained leave to bring up the undesignated portions of the record. Upon inspection, the Court will readily see that there is nothing in them which supports the thesis that appellee concluded a two-year contract with appellant, written or oral.

II.

Even assuming an oral agreement, *Seymour* v. *Oelrichs* may not be applied.

Appellee's effort to avoid the statute of frauds must rest in the first instance upon the existence of an oral agreement. Indeed, the vague and conclusory testimony of appellee illustrates perfectly the reason for the enactment of the statute of frauds in so many jurisdictions, and its retention as part of the common law where it has not been the subject of specific legislation. See *Holton* v. *Reed* (10 C. A. 1951) 193 F. 2d 390, 393. The attempt to invoke the doctrine of promissory estoppel must rest on the rather violent assumption that there was a meeting of the minds of Stephenson and Marshall upon the promise alleged.

Appellee's principal reliance is upon the case of *Seymour* v. *Oelrichs* (1909) 156 Cal. 782, 106 P. 88.

Appellee contends (Brief, p. 29) that "had the facts as presented in the *Seymour* case been decided in the New

York jurisdiction, the decision would be one and the same even though the New York court would in all likelihood * * * have refused to use the label promissory estoppel." The clear implication is that the New York court would have used the label "partial performance", since that is the only ground upon which the New York Court of Appeals has enforced oral contracts within the statute of frauds where the statute has been pleaded as a defense. But appellee is clearly wrong as to the *Seymour* case, for this, like the present case, was a case of a contract not to be performed within the year and, therefore, covered in New York by § 31 of the Personal Property Law. And by a plethora of authority (Main Brief, pp. 21-22) nothing short of full performance by both parties will take such a contract out of the operation of the statute. It is only as to contracts relating to real property (§ 259 of the Real Property Law) that partial performance will ever result in the enforcement of the oral contract.

The difference between the doctrine of partial performance, as developed under § 259 of the New York Real Property Law, and the doctrine of promissory estoppel, as developed in California and other jurisdictions, is not one of label only. No doubt an oral contract which New York would enforce under its doctrine of partial performance would also be enforced in California under the doctrine of promissory estoppel. That is so because every case of part performance by the promisee involves detriment to the promisee in reliance upon the oral promise. But it does not necessarily follow that an oral promise which would be enforced in the jurisdictions entertaining the doctrine of promissory estoppel would be enforced in New York as partial performance. It is implicit in New York law, as developed by the Court of Appeals, that performance by the promisee which will avoid the statute of frauds must be of a nature itself to evidence the oral contract claimed. As put by Cardozo, J., in *Burns* v. *McCormick* (1922) 233 N. Y. 230, 232-3, 135 N. E. 273, a case in which relief was denied:

> "What is done must itself supply the key to what is promised. It is not enough that what is promised may give significance to what is done. The housekeeper who abandons other prospects of establishment in life and renders service without pay upon the oral promise of her employer to give her a life estate in land, must find her remedy in an action to recover the value of the service (*Maddison* v. *Alderson,* L. R. 8 App. Cases, 467, 475, 476). Her conduct, separated from the promise, is not significant of ownership either present or prospective (*Maddison* v. *Alderson, supra,* at pp. 478, 481). On the other hand, the buyer who not only pays the price, but possesses and improves his acre, may have relief in equity without producing a conveyance (*Canda* v. *Totten,* 157 N. Y. 281; *McKinley* v. *Hessen,* 202 N. Y. 24). His conduct is itself the symptom of a promise that a conveyance will be made. Laxer tests may prevail in other jurisdictions."

The additional requirement which New York makes over and above a mere showing that the promisee has relied upon the promise to his detriment is emphasized by italics in the following quotation from the opinion of Collin, J., in *Woolley* v. *Stewart* (1918) 222 N. Y. 347, 351, 118 N. E. 847:

> "He may, however, withdraw himself from the policy and defense of the statute, or waive its protection, by inducing or permitting without remonstrance another party to the agreement to do acts, pursuant to and in reliance upon the agreement, to such an extent and so substantial in quality as to irremediably alter his situation and make the interposition of the statute against performance a fraud. In such a case a court of equity acts upon the principle that not to give effect to those acts would be to allow the party permitting them to use the statute as an instrument defending deception and injustice. *The acts must, however, be so clear, certain and definite in their object and design as to refer to a complete and perfect agreement of which they are*

a part execution—must be unequivocal in their character and must have reference to the carrying out of the agreement. An act which admits of explanation without reference to the alleged oral contract or a contract of the same general nature and purpose is not, in general, admitted to constitute a part performance.''

In the instant case, the acts of appellee which are claimed to establish the basis for the estoppel admit of explanation without reference to the alleged oral contract, for they are equally attributable to a continuation of the hiring at will. Appellee concededly had no contract prior to March 16th (127-128). He had been employed by appellant since the previous September (121) under a contract at will, and had removed his family to Alaska the previous January. Thus, the surrender of the Western Airlines job and his return to Alaska and resumption of his duties there furnishes no ''key'' as to what the agreement between the parties actually was. And even if it had any evidentiary force, it would be completely rebutted by appellee's conduct, in his return to New York within a few weeks to press on appellant a proposed written contract wholly different in its terms from that which is now sought to be enforced (137-142).

The case of *Seymour* v. *Oelrichs,* principally relied upon by the appellee, would not have been decided for the plaintiff in New York for the reasons outlined above. In any event, that case is clearly distinguishable on its facts from the instant case. In *Seymour* v. *Oelrichs* the plaintiff had not been previously employed under a hiring at will.

Appellee endeavors to whittle down the strictness of the New York rule by reference to *M. H. Metal Products Corporation* v. *April* (1929) 251 N. Y. 146, 150, 167 N. E. 201, and to three decisions of the lower courts. The Court of Appeals case lends no support to appellee's position. Defendant guarantor, by reason of his conduct, was

estopped to assert the defense that an oral modification increasing the contract price had discharged him from his guaranty. But he was held liable only to the extent of his actual written guaranty.

In *Gorman* v. *Fried* (App. T., 2d Dept. 1942) 35 N. Y. Supp. 2d 441, defendant was held liable, despite the statute of frauds, to pay the installments due on the purchase of an automobile. But plaintiff had fully performed; defendant had the automobile.

In the *nisi prius* case of *In re Melia's Estate* (Sur. Ct., Westchester Co. 1950) 98 N. Y. Supp. 2d 941, the discovery proceeding was held to be in the nature of a accounting of a joint venture. It is not clear how the statute of frauds applied.

Appellee has missed the significant point in the *nisi prius* case of *Weiss* v. *Weiss* (Kings, Trial T., 1944) 49 N. Y. Supp. 2d 128. Plaintiff was induced to abandon an attempted reorganization of his laundry corporation under the Bankruptcy Act and to permit it to be adjudicated a bankrupt upon the promise by his two daughters and their husbands that they would acquire the assets at the bankruptcy sale, would carry on the business, and pay plaintiff $50 a week for the rest of his life. The agreement to pay the $50, though oral, was enforced by the Court in view of the fact that one son-in-law was plaintiff's attorney and the additional fact that he and the other son-in-law and his wife had concealed from plaintiff the fact that they had already acquired two mortgages which were a first lien upon the property, one of which was held by the Reconstruction Finance Corporation. The Court was thus moved by the existence of the fiduciary relationship and the concealment of the material fact that the mortgages were now in family hands. Rose Weiss, the wife of the attorney Martin, had not acquired any interest in the two mortgages nor had she concealed the fact of the acquisition of the mortgages from her father. The significant thing about this decision is the following (p. 134):

> "Defendant Rose Weiss (Martin's wife) urged plaintiff to accept the retirement offer. She agreed to perform her part of the contract. She defaulted. But she urges the statute of frauds as a defense. There is nothing in the evidence which embarrasses her in this respect. As to her, the statute is operative. The defense is good."

If the doctrine of promissory estoppel had been admitted, clearly the defense of Rose Weiss was no better than that of the others against whom estoppel *in pais* was enforced, since plaintiff had abandoned his reorganization plans in reliance upon her promise as well as that of the others.

The Per Curiam decision of this Court in *Union Packing Co.* v. *Cariboo Land & Cattle Co.* (9 C. A. 1951) 191 F. 2d 814, does no more than to hold that *Seymour* v. *Oelrichs* is the law of California. It is not the law of California, but the *lex loci contractus* which is decisive in the present instance. The obligation of the contract must be determined by the law of New York.

It would be absurd to suppose that the New York Court of Appeals would carefully insist, as it so often has, that the acts on the part of the promisee, which will take a case out of the statute of frauds found in § 259 of the Real Property Law, must be unequivocably referable to the contract, and then waive that requirement with respect to § 31 of the Personal Property Law as to which it has never been willing to admit the doctrine of partial performance at all.

III.

New York Law Applies.

Comment "b" of § 334 of the Restatement of Conflict of Laws, so far as material, is as follows:

> "The requirements of writing may be a requirement of procedure or a requirement of validity, or

> both. If, for instance, the statute of frauds of the place of contracting is interpreted as meaning that no evidence of an oral contract will be received by the court, it is a procedural statute, and inapplicable in the courts of any other state (see § 598). If, however, the statute of frauds of the place of contracting is interpreted as making satisfaction of the statute essential to the binding character of the promise, no action can be maintained on an oral promise there made in that or any state; and if the statute of frauds of the place of contracting makes an oral promise voidable, and the promisor avoids such a promise, the same result follows. * * *''

There is no reason to suppose that the Conflicts Law of Alaska is different. Appellee apparently accepts the Restatement on this point (Brief, pp. 31-32).

It is agreed (Appellee's Brief, p. 30) that textually the Alaska and New York statutes relating to agreements not to be performed within the year are substantially identical. Appellant contends that despite the fact that both make the unwritten agreement "void", they are both procedural statutes. Hence, appellee argues (Brief, p. 31) that appellee "must only establish that the doctrine of estoppel is recognized in the jurisdiction of Alaska since the law of the forum controls the matter of evidence."

Appellee's argument that the Alaska statute is procedural appears to be based entirely on the fact that the section in question (§ 58-2-2) is grouped with other sections under a chapter headed "Indispensable Evidence". But a title, though it should not be entirely ignored, is "of little weight". *Goodlett* v. *Louisville Railroad* (1887) 122 U. S. 391, 408. See also *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio Railroad Co.* (1947) 331 U. S. 519, 528. Especially must this be so where the title was not affixed by the legislature when the statute was originally enacted, but merely appears in a subsequent codification.

There is no discussion of the doctrine of promissory estoppel in *Rassmus* v. *Carey* (D. C. Alaska, 1947) 11

Alaska 456. Assuming, however, as appellee does, that *Rassmus* v. *Carey,* is to be regarded as adopting the theory of promissory estoppel for Alaska, and further assuming that the Alaska statute is procedural, the only result of appellee's argument is that his recovery is not barred by the Alaska statute. This leaves entirely open the question whether recovery is barred by the New York statute.

If the New York statute is substantive and not procedural then, under the Restatement to which appellee subscribes, the contract in suit cannot be enforced in Alaska if appellant might have avoided its performance in New York. Indeed, as pointed out in a Note, 47 Harvard Law Review 320:

> "* * * if a contract fails to satisfy the statutory requirements of the *locus* it establishes no perfected obligations there, and enforcement by the forum would in reality be a *de novo* creation of rights."

Whatever may be said as to the Alaska statute, the conclusion is inevitable that the New York statute is substantive. It must be agreed that appellee does find some support for his position in the language of *Wikiosco, Inc.* v. *Proller* (3d Dept. 1949) 276 N. Y. App. Div. 239, 94 N. Y. Supp. 2d 645 dealing with the Real Property Section and not with Section 31. However, the New York cases cited in this intermediate appellate decision are either those in which recovery was permitted upon the theory of partial performance, those which relate to the sufficiency of the writing or those in which plaintiff was allowed a recovery because defendant failed to plead the statute of frauds. The legal basis of this last proposition, well settled in New York law, however, is not that the statute is procedural or evidential, but that its effect is to make the unwritten contract voidable at the option of the promisor. The matter is thus explained in *Matthews* v. *Matthews* (1897) 154 N. Y. 288, 48 N. E. 531, where the Court said, per Andrews, Ch. J. (pp. 291-292):

> "It is plain, upon the view that the Statute of Frauds does not make an oral contract within its terms illegal, but only voidable at the election of the party sought to be charged, that such election must be manifested in some affirmative way. The mere denial in the answer of the contract alleged in the complaint, when the character of the contract is not disclosed, is quite consistent with an intention to put in issue simply the fact whether any agreement was entered into, either oral or written. One of the rules established by the English Judicature Act, as amended in 1873 (38 & 39 Vict., ch. 77, rule 19), ordained that, 'where a contract is alleged in any pleading, a bare denial of the contract by the opposite party shall be construed only as a denial of the making of the contract, and not of its legality or its sufficiency in law, whether with reference to the Statute of Frauds or otherwise,' and in Towle v. Topham (37 L. T. [N. S.] 309), Jessel, M. R., applied the rule to the pleadings in an equity case."

Nothing could be clearer than that the right of the promisor to elect whether or not to treat his oral promise as binding is a substantive right.* And thus the New York statute of frauds clearly comes squarely within the language of the Restatement Comment quoted above:

> "* * * and if the statute of frauds of the place of contracting makes an oral promise voidable, and the promisor avoids such a promise, the same result [i.e., no action maintainable in any state] follows."

A square holding on the precise question involved herein was handed down in the recent New York case of *Silverman* v. *Indevco, Inc.* (N. Y. Sp. T. 1951) 106 N. Y. S. 2d 669. In that case an oral employment agreement for a period of two years made in Pennsylvania would have been valid under Pennsylvania law, but it was contended that no re-

* A bill in the 1953 Legislature (G. O. 120, Nos. 142, 2947, Int. 142) which would have substituted for the words "is void" in § 31 the words "shall not be enforceable by action" was vetoed by the Governor.

covery might be had in New York because the New York statute was procedural. The Court said (pp. 670-671):

> "The application of section 31 to the contract in question would seem to depend upon whether it is substantive or procedural in content. It is fairly clear that if section 31 has to do with the validity of the contract then lex loci contractus applies, and if it relates to its enforcement or procedure incident thereto, lex loci forum governs. Russell v. Societe Anonyme Des Etablissements Aeroxon, 268 N. Y. 173, 197 N. E. 185; Bitterman v. Schulman, supra; Regan v. Nelden, 178 Misc. 86, 33 N. Y. S. 2d 138.
>
> "Section 31 makes void any agreement not to be performed within one year from the making thereof. In the opinion of the court the section relates to validity and, therefore has no application to the contract at bar, which so far as appears on this application, as to its validity is governed by lex loci contractus."

This decision was affirmed without opinion, 279 App. Div. 573, 107 N. Y. S. 2d 542.

Since the New York statute is substantive, and since New York would not employ the doctrine of promissory estoppel to defeat the application of the statute (even assuming that a case for promissory estoppel has been made, which it has not), the instant contract must be held unenforceable under the statute of frauds.

Dated: Anchorage, Alaska, May 15, 1953.

Respectfully submitted,

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